Douglas Halts Ellsberg Trial Over Wiretap

7/30/71

By Sanford J. Ungar
Washington Post Staff Writer

LOS ANGELES, July 29—Supreme Court Justice William O. Douglas, acting on a defense appeal over government wiretapping, today halted the Pentagon Papers trial of Daniel Ellsberg and Anthony Russo 48 hours before it was to begin.

Ruling from his mountain cabin in Goose Prairie, Wash., Douglas said he was "exceedingly reluctant" to stop a trial in which the jury had already been selected.

But he said he was doing so out of concern that the defendants' constitutional rights may have been violated by "the powerful electronic ear of the government."

"The constitutional right earnestly pressed here is the right to counsel guaranteed by the Sixth Amendment," Douglas wrote. "That guarantee obviously involves the right to keep the confidences of the client (of the attorney or consultat who was overheard) from the ear of the government, which these days seeks to learn more and more of the affairs of men."

He gave attorneys for Ellsberg and Russo until August 28 to file a petition for review of the wiretap issue by the full Supreme Court.

The Justice Department would then have 20 days to reply.

Douglas's action, after an emergency hearing in Yakima, Wash., Friday afternoon, raised the prospect that the Pentagon Papers trial—a test of the federal government's power to control disclosure of sectet documents—would be delayed until after the high

See ELLSBERG, A5, Col. 1

ELLSBERG, From A1

court convenes for its new term in October.

If the prosecution asks that Douglas's decision be reviewed immediately by the full court and the other justices reverse him, however, the much-delayed trial could still go forward this summer.

Solicitor General Erwin N. Griswold said in Washington, "We are planning to file an application with the court to set aside the stay" granted by Douglas. He said thenecessary papers would be filed early Monday morning and that it would be up to Chief Justice Warren E. Burger to decide whether to convene the court or to informally poll the justices.

"We hope the trial can go ahead," Griswold said.

Ellsberg and Russo are charged with conspiracy, espionage and theft of government property in connection with their disclosure of the Pentagon Papers, a top-secret Defense Department history of U.S. involvement in Southeast Asia.

It was revealed last Monday that a government agency overheard one of 16 defense attorneys or consultants during electronic surveillance directed against an unidentified third party.

The defense appealed to Douglas after U.S. District Court Judge W. Matt Byrne Jr., who is president over the case, and a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit rejected its demand for full information on the wiretap.

Even if the overheard conversation appeared to judges to be "innocuous," they argued, it might have violated Ellsberg's and Russo's Fourth Amendment right to counsel.

Douglas said today, in a three-page opinion that he prepared overnight and dictated from a mountain phone booth to the Supreme Court clerk's office in Washington, D.C., that "conscientious regard" for these rights required him to grant a stay of the trial.

During the extraordinary court session in Yakima on Friday — only the second that Douglas has held there as circuit justice for the ninth federal judicial circuit — chief prosecutor David R. Nissen said that the wiretap in question involved "foreign intelligence" and had been installed at the direction of the Attorney General, rather than by court order.

But he still refused to say which attorney or consultant had been overheard.

The Supreme Court ruled last month that such non-court-authorized wiretaps are illegal when they are directed against persons the Justice Department considers "subversive" for "national security" reasons.

That decision, however, left open the question of whether the federal government could eavesdrop without court authority for "foreign intelligence" reasons.

Douglas warned the prosecutors during the hearing that "this line between foreign and domestic will fall out" when the high court takes up a case that poses the issue."

"We haven't held that the Fourth Amendment is not applicable just because there's a foreigner involved," he added.

The justice's decision was apparently based on his own "prediction of the reaction of my brethren" on whether they would like to consider the Ellsberg-Russo appeal, as he put it Friday.

Supreme Court practice dictates that such a stay can be issued by a single justice only when he thinks that three other members of the court would agree with him that the case presents major issues which require full-scale review.

"If I alone have strong feelings, that is not enough," he explained to the lawyers Friday.

There was no immediate indication from Douglas or from the Supreme Court clerk's office as to whether he had consulted other justices by telephone before issuing the stay.

But Douglas has been known in the past to take emergency actions with which his fellow justices angrily disagree.

The solicitor general's decision to seek reversal of Douglas's stay was expected to pose practical problems for the chief justice.

"I don't know where our court is," Douglas said during the hearing in Yakima. "They're scattered all over the world, I guess."

He stressed that his ruling would have to be made without the assistance of a law clerk, a secretary or a law library.

"the constitutional right of the client, of course, extends only to his case, not to the ot concerns of his attorney," Douglas said in his opinion today.

"But unless he (the client) n be granted standing to determine whether his confidnces have been disclosed tonthe powerful electrinic ear x the government, the Constitutional fences protective of privacy are broken dawn."